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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAY - 8 1990

In the Matter Of)

Maintaining The Confidentiality)
Of Proprietary Customer Data)
Submitted To Coordination)
Entities In Accord With)
Section 90.179(e) Of The Rules)

RM No.

Federal Communications Commission
Office of the Secretary

To: The Commission

PETITION FOR RULE MAKING

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SUMMARY

Petitioners hereby request that the Commission initiate a rule making to add language to Section 90.179(e) which would protect the proprietary nature of customer data provided to frequency coordinating entities in accord with this Rule Section.

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Bakersfield Communications Corp.; Columbia Communications, Inc.; Communications Center, Inc.; Communications Ventures, Inc.; Kentec Communications, Inc.; Madera Radio Dispatch, Inc.; Mobile Communications, Inc.; Nu-Page of Winder; Paging Plus; and Tri-City Beepers, Inc. hereby join to request that the Commission initiate a rule making to amend the provisions of Section 90.179(e) of the Commission's Rules. Petitioners request that the Commission take immediate steps to protect the confidentiality of their customer data against unwelcome and improper use by competitors within their markets.

The Petitioners Should Be Protected

Bakersfield Communications Corp. provides Business Radio Service private carrier paging and two-way private carrier service to eligible end users in the Bakersfield, California area. The principals of Bakersfield Communications Corp. had

formerly operated a group of community repeaters and have elected to operate those facilities under private carrier authorizations. Although Bakersfield Communications Corp. has complied with the requirement that it report customer information to NABER, it is not comfortable with the possible consequences of disclosing valuable proprietary information to the frequency coordinator.

Kentec Communications, Inc. is a provider of Business Radio Service private carrier paging service in rural areas of the States of Colorado and Wyoming. Although the number of eligible end users to whom service can be provided in its service area is far smaller than the number available to carriers in major urban areas, Kentec has found success in providing new communications choices to its customers. Under Section 90.179(e), Kentec is required periodically to supply to the National Association of Business and Educational Radio, Inc. ("NABER") information which includes the identities of its end users.

Mobile Communications, Inc. is an operator of two-way Business Radio Service private carrier facilities in the Merced, California area. Its sales of two-way equipment have made it one of the top dealers in the country and it provides service to dozens of private carrier end users. NABER has requested customer data from Mobile Communications, Inc. pursuant to its authority under Section 90.179(e) of the Commission's Rules for one of the company's private carrier systems. The company

complied with NABER's request but is concerned with the eventual outcome of its compliance.

Madera Radio Dispatch, Inc. is also a private carrier which operates within the Madera, California market. It has provided two-way service to customers via community repeaters, SMRs, and radio common carrier facilities for over twenty years. The Company provides private carrier paging and two-way service to hundreds of customers in the Madera, California market. With increased competition in its market from telephone companies, large common carriers, and national SMR networks, the company believes that the protection of its customer data is vital in assuring its continued presence in the market.

Communications Ventures, Inc. operates private carrier paging facilities in Dallas, Texas and Denver, Colorado. Its purchase of these systems has occurred in the last two years. Its entrance into both markets has assisted in revitalizing the communications offerings in those markets. The company seeks to protect its huge investments in those markets by insuring that the customer bases in which it has invested heavily are not threatened by the leaking of vital customer data to competitors.

Columbia Communications, Inc. operates several two-way private carrier facilities and is a licensee of a private carrier paging station. Columbia operates its facilities in the central-

northern portion of California near Sonora and Angels Camp. The company has complied with previous requests for customer data. However, Columbia is concerned about maintaining the confidentiality of that information.

Communications Center, Inc. is a provider of two-way service in South Dakota and has hundreds of customers on its radio systems. It is concerned that the required information may become available to its competitors and that improper use of the information will erode its customer base.

Paging Plus is a provider of Business Radio Service private carrier paging services in the Los Angeles, California area. The highly competitive L.A. market demands that Paging Plus spend substantial resources in cultivating and maintaining a customer base. Paging Plus is concerned that the resources which Paging Plus has expended in creating a profitable, stable business are jeopardized by the lack of protection of its customer data afforded by the current Commission Rules.

Nu-Page of Winder operates a private carrier paging system in Winder, Georgia. With the introduction of competition into the market from large, out-of-state communications concerns, Nu-Page is required to be increasingly aggressive in the marketing of its service. Nu-Page believes that the considerable resources devoted to acquiring and maintaining a customer base should be

protected from competitors seeking to shortcut the marketplace by potentially purchasing customer data, or from acquiring such data due to insufficient security provided by frequency coordinators.

Tri-City Beepers, Inc. provides VHF private carrier paging services in the Albany, New York area. It is a new company and, therefore, is concerned that its revenue continue to be stable so that debt incurred for construction can be serviced reliably. Tri-City fears the instability which could be caused by the provision of customer data to its competitors -- most of which have financial resources greatly in excess of Tri-City.

It is apparent that all of the Petitioners have a vital interest in maintaining the confidentiality of their customer data. It is further apparent that the present application of Section 90.179(e) of the Commission's Rules threatens the confidentiality of Petitioners' customer data lists by compelling Petitioners to reveal all of their customer data to frequency coordinating entities. The Commission, however, has not imposed any duty on the frequency coordinators to safeguard the information upon receipt.

Petitioners believe that their situation and opinions are not unique to them and contend that most private carriers subject to the requirements of Section 90.179(e) share Petitioners' concerns and would join in this request for rule making.

The Nature Of The Required Information Creates Concern

Requests made by NABER for information are highly detailed and include the customers' names, addresses, telephone number, number of mobiles, and contact representative. Such information can be immediately converted into marketing data for competitors if obtained from a coordinating entity. Petitioners are concerned that this detailed information will become available through frequency coordinating entities, which are not currently precluded by the Commission's Rules from selling such information, or which do not protect against their employees' releasing the data to other persons.

It is well established that the services provided to customers and end users are fungible in nature. The equipment used by a private carrier customer can easily be converted to be used in association with a competing carrier's system. Programmable radios make such a conversion a simple matter. No longer can commercial operators rely on the noncompatibility of equipment and frequency to protect their efforts to assemble a loyal clientele. Now, with the assistance of specific customer data purchased from a coordinating entity, a responsible operator could see years of effort eroded in weeks as his customers are approached and lured onto his competitor's system.

Although Petitioners believe that vigorous competition is healthy and that competition based on price; terms of service;

and quality, grade, and reliability of service is beneficial to end users, the systematic, specific targeting of each business served by a private carrier based on information proprietary to the victim carrier is not healthy competition. It undermines the goodwill developed between the customer and the existing carrier. The stability of a carefully and honestly developed relationship between a carrier and its customers is disrupted and the continued economic viability of the existing carrier's business may be threatened.¹

The ability of competitors to engage in this practice is limited only by a carrier's success in protecting the confidentiality of his customer list. Operators closely guard customer information from competitors. In fact, one of the primary motivations for converting a community repeater to private carrier is to safeguard end user information by avoiding separate licensing requirements for each customer.² These safeguards are

¹ In a context only slightly different, the Commission has refused to renew a Public Coast station license where the licensee violated Section 605 of the Communications Act of 1934 for the purpose of compiling a list of competitors' customers. Gulf Coast Communications, Inc.. PR Docket No. 78-259 (FCC Mimeo 94809) released April 16, 1982. In Gulf Coast, the Commission affirmed a decision by the Review Board holding that the wrong lay in the mere attempt to use the improperly obtained customer list, and whether Gulf Coast had succeeded in diverting any competitor's customers was not significant.

² Concurrently, an eligible may desire to use a private carrier's service, rather than constructing his own facilities, as a contribution to the confidentiality of his own business activities. Since the identity of an end user of a private carrier--like the subscriber of a common carrier--does not appear

in jeopardy under the Commission's current Rules. Petitioners request that the Commission take positive steps to prevent theft of their investments in their businesses by initiating a rule making to protect the confidentiality of their customer data.

Local Laws Provide No Protection

Improper procurement of customer lists for competitive purposes is a crime under most state laws. In those instances where a competitor or former employee obtains customer information to a company's detriment, many state courts will provide a remedy. However, it is highly doubtful whether a state court would provide such a remedy when the information was voluntarily given by the injured party in accord with Federal law to an entity operating under color of the Commission's regulation. Since the regulations do not prohibit sale of the information following receipt, such sale would not appear to be in violation of any law or statute. Therefore, the purchaser of such

in the public records, it may be more difficult for the competitors of a private carrier end user to find out how to eavesdrop on his radio communications. It would also be more difficult for his competitor to ascertain the quality and extent of communications facilities required to compete with the cautious business person.

At Section 631 of the Communications Act of 1934, 47 U.S.C. §551, Congress saw the wisdom of protecting the privacy of the customers of cable television systems. Under Section 551, a CATV operator is required to give subscribers the opportunity to prohibit or limit disclosure of information about them and is required "to destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected". Some states have taken the opportunity to protect the privacy of CATV subscribers even more fully.

information would also appear to be shielded from liability under state law.

At the very least, the application of state law to this situation would be unpredictable and would undoubtedly vary from state to state. Additionally, resolution of these questions might take years and might not be resolved before the injured private carrier had lost all of his business due to the actions of an unscrupulous competitor.³

It, therefore, falls on the Commission to take responsibility for protecting the business of legitimate private carriers by mandating that customer data provided to frequency coordinating entities be kept completely confidential. Although the legitimate ends of regulating the radio spectrum may be served by requiring the reporting of such data, there is no legitimate purpose to be served by not protecting private carriers which comply with the Commission's Rules.

Petitioners are aware of the Commission's communicated "expectation" that coordinating entities will not engage in the sale of customer data. Petitioners applaud the Commission for

³ Whether in a highly competitive urban environment or in a thinly populated rural area, experience shows that the hold of a communications carrier on his customers is fragile and easily shattered by well supported efforts to raid an existing customer base.

communicating this expectation, but the nature of the information to be protected is so sensitive and valuable to private carriers that greater assurance is required. Given the doubtful application of state law to this situation, Petitioners respectfully request that the Commission immediately create Rules to protect private carrier customer data. At the least, the Commission should move from holding an expectation to adopting a prohibition on the undesired behavior.⁴

There Is No Reason Not To Create Such A Rule

There exists no legitimate reason not to create such a rule. The coordinating entities will not be injured if, in accord with the Commission's expectation, they do not intend to sell customer data. The Commission would not be required to spend any money or workhours in administering the requirement unless the requirement were violated by a coordinator. Meanwhile, the Commission would receive greater assurance that its stated expectations are being met. Persons desiring to purchase such lists do not have a legitimate interest in preventing the adoption of such a rule. Therefore, there exists no reason not to adopt such a rule.

Nor do Petitioners believe that the Commission intentionally omitted this protection when 90.179(e) was adopted. The record

⁴ It is not reported that Moses was told that men were expected not to steal. Uncontested reports indicate that simpler, yet firmer--and generally effective--language was conveyed.

of the proceeding which created the requirement, Memorandum Opinion and Order, PR Docket 83-737 (Released September 26, 1986) was silent on the matter of protection of private carriers' customer lists. Coordinating entities were provided with no instruction from the Commission regarding what use beyond frequency coordination enhancement was to be made or allowed. Accordingly, Petitioners believe that the instant request will rectify a simple oversight in that rule making, unintended by all of the parties to that rule making.

Finally, private carriers are required to pay the coordinating entities to receive this data, regardless of whether the frequency coordinators make any use of it. Presently NABER charges \$30 to a private carrier who fulfills his duty under 90.179(e). The private carrier should not be placed in the position of paying someone to receive information from him and then seeing the recipient disclose the information to others, perhaps at a further profit to the recipient.

Adoption Would Promote Compliance

In many recent statements made by the Commission, such as those contained in its Notice Of Proposed Rule Making in PR Docket 88-548, the Commission has recognized the growing incidents of scofflaw acts. Limited enforcement resources and increased spectrum congestion have resulted in a growing number of non-complying activities. By adoption of a rule protecting

private carriers, the Commission would create a much more favorable climate for compliance with Section 90.179(e) by removing private carriers' fears that their customer data will not be protected.

Additionally, the Commission's expectation that coordinating entities would not engage in the sale of private carrier customer lists would be more likely to become reality. Coordinating entities which now might not adequately protect the information, creating risks that the information might be "leaked" to a carrier's competitor, would be given the necessary incentive to provide adequate protection from such circumstances. The Commission's Rules contain many such cautionary warnings and these Rules serve the public interest in articulating the Commission's interest in a stable, growing communications marketplace that is free of chaotic, unscrupulous competition.

Suggested Rule Change

Petitioners suggest that Section 90.179(e) of the Commission's Rules be revised by adding the following sentence:

All information provided to the frequency coordinator in compliance with this section shall be deemed to be proprietary and confidential to the provider thereof and shall not be disclosed in any manner by the frequency coordinator to any person who is not a member of the Commission's staff.

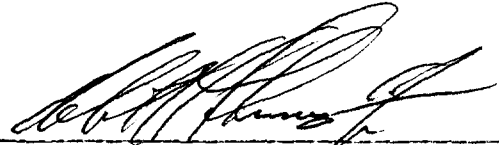
Conclusion

For the reasons stated above, Petitioners request that the Commission commence a rule making procedure to include in its Rules the language suggested above.

Respectfully submitted,

KENTEC COMMUNICATIONS, INC.
BAKERSFIELD COMMUNICATIONS CORP.
COMMUNICATIONS VENTURES, INC.
COLUMBIA COMMUNICATIONS, INC.
COMMUNICATIONS CENTER, INC.
PAGING PLUS
NU-PAGE OF WINDER
TRI-CITY BEEPERS, INC.
MADERA RADIO DISPATCH, INC.
MOBILE COMMUNICATIONS, INC.

By



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Dated: 5/8/80

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